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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 115

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO,
Petitioner,

vs.

HORACE HAVEMEYER ET AL. (Russell & Co., Sucrs., S. en C.)
Respondents.

REPLY BRIEF FOR PETITIONER ON CERTIORARI

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REPLY BRIEF FOR PETITIONER ON CERTIORARI

Certiorari was granted in this case, October 14, 1935. Petitioner advised the clerk of this court and opposing counsel that petitioner would stand upon its original petition and supporting brief, together with its "Reply Brief for Petitioner in Support of Petition for Certiorari", as its brief on certiorari, and accordingly respondents have filed their "Brief for Respondents Upon Review by Certiorari of Judgment of the Circuit Court of Appeals for the First Circuit." This is in reply to that brief.

In the Petition for Certiorari and Supporting Brief, as well as in the Reply Brief for Petitioner in Support of the Petition for Certiorari, filed prior to the granting of the writ of certiorari, page references to the record were

to the printed record of the Circuit Court of Appeals, copies of which were filed with the Petition for Certiorari. In the present brief, on the other hand, page references are to the Transcript of the Record as now printed by the clerk of this court.

I

Examination of respondents' brief shows that it, like their former brief in opposition to the petition for certiorari, rather emphasizes the correctness of our position and of the distinction drawn in our petition and brief between the kind of "reasonableness" which means the wisdom or expediency of administrative action within the acknowledged limits of executive power, and the other kind of "reasonableness" which has to do with the question whether or not in the exercise of police powers or other kindred powers the executive arm has reached beyond the proper limits of its powers and has acted arbitrarily or capriciously so as to deprive any person of liberty or property without due process of law. The first kind of "reasonableness" — or "unreasonableness" on the contrary, — in the exercise of admitted executive power,—that is to say, any question of the wisdom or unwisdom or expediency or inexpediency of executive action within its own province,—can never be a judicial question, nor the subject of judicial review in a constitutional court of the United States. As was well said by the Circuit Court of Appeals for the First Circuit itself in its former opinion when this same controversy came up upon the initial bill for injunction (*South Porto Rico Sugar Co. and Russell & Co.* v. *Miguel A. Munoz, et al., Public Service Commission of Puerto Rico,* 28 F. (2d) 820, 821; Petition, Appendix II, p. 46):

> "Courts have no general supervisory power over such tribunals as Public Service Commissions. Judicial interference, apart from express statutory delegation, must be grounded on illegal encroachment upon property rights."

But such a "general supervisory power" over the wisdom and fairness of the executive action of the Commission in exercising its power to repeal this franchise is just what the Circuit Court of Appeals did attempt to exercise in its present decision in this case; and that is the only kind of "reasonableness",—and the only kind of question,—here involved. Russell & Co. had accepted a franchise subject, by its own terms, and by the express direction of the Act of Congress under which it was granted,[1] to cancellation at any time at the discretion of the Puerto Rican government. It was cancelled by the executive body,—the Public Service Commission,—clothed with the executive power for that purpose, after a full hearing and for administrative reasons which the Commission judged sufficient to require the cancellation; viz., that the franchise holder was improperly permitting the level of the lake to rise, in violation of the terms of the franchise, to such a height as to cause extensive flooding of the neighboring Municipality of Lajas.

If the exercise of such administrative discretion to cancel such a franchise in accordance with the express terms of the franchise itself, is subject to judicial review, then it means that the franchise is not really terminable at all in the discretion of the government in accordance with the terms upon which the grantee accepted it and upon which the Congress required that it should be granted; but is really perpetual; and can only be terminated upon the same basis as though it did not contain the clause reserving to the government the right to repeal it. But that cannot be true. Manifestly, the executive authority of the government has, under this clause reserving the power of cancellation, the same power to cancel it at discretion that a landlord has in any ordinary lease terminable at will or from month to month; and its termination by the executive au-

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[1] Section 3 of Joint Resolution of Congress No. 23, May 1, 1900, 31 Stat. 715; quoted, petition for certiorari pp. 13-14.

thority is no more subject to judicial review than is the action of an ordinary landlord in exercising his discretion to terminate such a lease.

II

Such a reservation of power in the government to repeal it, embodied in the franchise itself,

> "places under legislative control all rights, privileges and immunities derived by its charter directly from the State". (*Tomlinson* v. *Jessup,* 15 Wall. (82 U. S.) 454, 459.)

Its very purpose is (*Tomlinson* v. *Jessup, supra,* at p. 458; *Stanislaus County* v. *San Joaquin C. & I. Co.,* 192 U. S. 201, 211):

> "To prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference";

the reservation of the right to repeal, alter or amend the franchise being **"itself a part of that contract"** (*Covington* v. *Kentucky,* 173 U. S. 231, 238, quoted and followed in *Stanislaus County* v. *San Joaquin C. & I. Co., supra,* 192 U. S. 201, 212-213; and see also to the same effect *Knoxville Water Co.* v. *Knoxville,* 189 U. S. 434). This court said in *Greenwood* v. *Freight Co.,* 105 U. S. 13, 20-21, that:

> "Mr. Justice Story in his concurring opinion in the Dartmouth College Case" (*Trustees of Dartmouth College* vs. *Woodward,* 4 Wheat. 518, 708, 712) "suggested that when the legislature was enacting a charter for a corporation, *a provision in the statute reserving to the legislature the right to amend or repeal it, must be held to be a part of the contract itself.* And the subsequent exercise of the right would be in accordance

with the contract, and could not, therefore, impair its obligation. * * * (p. 20) * * * (*Italics supplied*)

"This history of the reservation clause in acts of incorporation supports our proposition that whatever right, franchise, or power in the corporation depends for its existence upon the granting clauses of the charter is lost by its repeal. (p. 21) * * *

"* * * It was, therefore, in the power of the Massachusetts legislature to grant to another corporation, as it did, the authority to operate a street railroad through the same streets and over the same ground previously occupied by the Marginal Company. Whether this action was oppressive or unjust in view of the public good, or whether the legislature was governed by sufficient reason in thus repealing the charter of one company and in chartering another at the same time to perform as part of its functions the duties required of the first, is not, as we have seen, a judicial question in this case." (p. 22)

Speaking by Mr. Justice Holmes, this court said in *Ramapo Water Co.* v. *New York,* 236 U. S. 579, 583:

"The charter of the company could, of course, be repealed without impairing the obligation of a contract, as the right was reserved, as usual, in the Constitution of the State. *Calder* v. *Michigan,* 218 U. S. 591";

and in the *Calder* case (*Calder* v. *Michigan, supra,* 218 U. S. 591, 598-599), this court said:

"The defendants now, on the ground that there are limits even to the operation of a reserved power to repeal, argue that we should consider these allegations" (of unfair motives of the Mayor and city authorities in passing the repealing ordinance)." *But we do not inquire into the knowledge, negligence, methods or motives of the legislature if, as in this case, the repeal was passed in due form. United States* v. *Des Moines Navigation & Railway Co.,* 142 U. S. 510, 544. The only question that we can consider is whether

there is anything relevant to the present case in the terms or effect of the repeal that goes beyond the power that the charter expressly reserves.

"The charter provides that 'The legislature may at any time hereafter amend or repeal this act.' * * *. By making a contract or incurring a debt the defendants, so far as they are concerned, could not get rid of an infirmity inherent in the corporation. They contracted subject, not paramount, to the proviso for repeal, as is shown by a long line of cases. *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Bridge Co.* v. *United States*, 105 U. S. 470; *Chicago Life Insurance Co.* v. *Needles*, 113 U. S. 574; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 313, 338, 340; *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 353, 354; *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 437, 438; *Manigault* v. *Springs*, 199 U. S. 473, 480. It would be a waste of words to try to make clearer than it is on its face the meaning and effect of this reservation of the power to repeal."

III

The cases cited by respondents are not to the contrary. They really recognize the distinction between the two different classes of cases,—between the two kinds of "reasonableness". They are all cases dealing with questions of the executive power overstepping its province and attempting to exercise arbitrary or capricious powers and thereby depriving persons of liberty or property without due process of law. For example, in the first case which they cite (Respondents' brief, pp. 20-21), *Pacific Telephone and Telegraph Co.* v. *Kuykendall*, 265 U. S. 196, the question involved, as stated by Chief Justice Taft at the outset of the court's opinion (265 U. S. at pp. 197-198) was "of the *confiscatory character* of rates for telephone service within the State of Washington and in the cities of Seattle and Tacoma (*italics supplied*), and the bill for injunction was rested on an allegation (*ib.* p. 198) "that the order of the Department of Public Works if enforced would deprive the

company of its property without due process of law, in violation of the Fourteenth Amendment", the order being one forbidding the company from putting into effect "the increased rates which the company proposes in all parts of Washington except Spokane", and the company claiming (*ib.* p. 199) that the rates fixed by the Commission "*were confiscatory.*" Manifestly, the question there involved was wholly different in character from the question here, which is simply of the "reasonableness", or rightness, or wisdom, of this Commission's exercise of the power, which the Circuit Court of Appeals agrees that it holds (R. 86), to repeal this franchise in strict accordance with its terms.[2]

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[2] It is immaterial that the insular statute (Public Service Act, Sec. 85, petition for certiorari, Appendix I, p. 42) as interpreted by the insular courts (R. 50 and R. 73, 75) may give such executive power, to determine whether the Commission s order is "reasonable", to the insular courts, which are not constitutional courts of the United States. The legislative authority may invest Congressional courts with administrative powers (*Keller* v. *Potomac Electric Co., supra,* 261 U. S. 428, 444; *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464, 468-469; *Radio Commission* v. *Nelson, supra,* 289 U. S. 266, 275); but not constitutional courts of the United States, such as the Circuit Court of Appeals.

(Whether the Legislature of Puerto Rico may validly invest the Puerto Rican insular courts with such executive power, in view of the provisions of the Organic Act for that Island distributing the governmental powers among the legislative, executive and judicial departments of the insular government in analogy to the distribution of such powers made by the Constitution for the federal government (*"Board of Control Cases", Springer and Agoncillo* v. *Philippine Islands,* 277 U. S. 189) is another question, not of present importance in this case, since the Public Service Commission's order was in fact approved by both of the insular courts, the District Court of San Juan and the Supreme Court of Puerto Rico.)

And in another case cited by respondents (Brief, pp. 23-24, and long excerpt in Appendix to Respondents' Brief, pp. 88-93), *Federal Radio Commission* v. *Nelson*, 289 U. S. 266, this court recognized the distinction between the two classes of cases, and that the judicial power is not concerned with any question of "the **wisdom or expediency** of the administrative action" (*ib.* p. 277). In that case the District Court of Appeals' reversal of the Radio Commission's order rested on the ground that the Commission's order was "in a legal sense **arbitrary and capricious**" (*ib.* p. 269). This court there expressly recognizes that a constitutional court of the United States may not review the exercise of executive discretion by administrative or executive authorities (*ib.* p. 275), and points out that under the 1930 amendment of the Federal Radio Act of 1927 (Act of July 1, 1930, c. 788, 46 Stat. 844, amending section 16 of the Act of 1927) the authority of the District Court of Appeals is limited "to questions of law" and to an examination of whether the Radio Commission's findings and orders "are *arbitrary or capricious*" (*ib.* pp. 275-276; *italics supplied*). That was the kind of question of "reasonableness" which this court in that case held it might review by virtue of its judicial powers under the Constitution, saying (*ib.* p. 276):

> "Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. *These are questions of law* upon which the Court is to pass"; (*Italics supplied*)

and that (*ib.* pp. 276-277)

> "The provision that the Commission's findings of fact, if supported by substantial evidence, shall be con-

clusive unless it clearly appears that the findings are arbitrary or capricious, cannot be regarded as an attempt to vest in the Court an authority to revise the action of the Commission from an administrative standpoint and to make an administrative judgment. * * * Such an examination is not concerned with the weight or evidence or with the wisdom or expediency of the administrative action. * * *

"* * * *The controlling question is whether the function to be exercised by this Court is a judicial function,* and if so, it may be exercised on an authorized appeal from the decision of an administrative body." (*Italics supplied*)

That is wholly in accordance with what was said in *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 444, cited in our original brief (p. 28) and with the general rule, upon which we rely, of the limits of the judicial power.

Respondents also cite (*Brief*, pp. 26-27) *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Wisconsin*, 238 U. S. 491, which holds only, as quoted by the respondents themselves (brief, pp. 26-27) from the headnote of that case, that

"the reserved right of altering and amending the charter of a corporation does not confer mere arbitrary power or authorize the taking of the corporation's property without compensation;"

and that (p. 502) as this court had said in *Shields* v. *Ohio*, 95 U. S. 319, 324:

"The alterations must be reasonable * * * and *consistent with the scope and object of the act of incorporation.*" (*Italics supplied*)

But that has nothing to do with the question here involved. This was not an alteration or amendment. It was an outright repeal, pursuant to a power expressly reserved in the franchise itself, which was one of the conditions upon which the grantee accepted it. As this court said in *Shields* v. *Ohio, supra*, 95 U. S. 319, 324:

> "It is urged that the franchise here in question was property held by a vested right, and that its sanctity, as such, could not be thus invaded. The answer is *consensus facit jus*. It was according to the agreement of the parties. The company took the franchise subject expressly to the power of alteration or repeal by the General Assembly. There is, therefore, no ground for just complaint against the State.
>
> "Where an act of incorporation is repealed, few questions of difficulty can arise."

IV

While it is true that the Circuit Court of Appeals says in its opinion (R. 92) that,

> "Under the circumstances disclosed by the record, the absolute cancellation of that part of the franchise pertaining to the use of the waters of the Lake [3] would, in our opinion, be an arbitrary and unreasonable act, if it involves, as it may have, a taking of a valuable property right acquired by the appellants under the franchise, viz: the right to take 20,000,000 gallons of water daily from Guanica Lake",

and that (R. 92),

> "To avoid future damages from flowage of lands in Lajas, it was only necessary to amend or modify the franchise by requiring the establishment of a gauge above which the waters should not be permitted to be raised by the owner of the franchise, except during periods of extraordinary rains, and for a period sufficient to permit the excessive waters to be reduced in due course to the height of the gauge so established";

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[3] The only part of the original tripartite franchise for irrigation, railroad, and wharf, in which Russell & Co., or these respondents, claim any ownership in this case; and the only part of the franchise in any way involved here, (R. 25; petition for certiorari, pp. 6-7; and order cancelling the franchise, R. 27-28).

yet the court, in saying that, apparently wholly fails to notice the important, *and controlling,* fact that this franchise, on its face, is terminable at any time at the discretion of the government;[4] and wholly fails to explain how in view of that contractual right expressly reserved to the government, the cancellation could in any way be considered as an "arbitrary and unreasonable act", or the "taking of a valuable property right acquired by the appellants under the franchise", since it is axiomatic that *"consensus facit jus"* (*Shields* v. *Ohio, supra,* 95 U. S. 319, 324),—if the Circuit Court meant to use those words as indicating in any way that the action of the Commission was beyond its powers or was an illegal taking of property of Russell & Co. without due process of law. And if the court does not mean to say that, but means only to indicate its belief,—which is as far as its language really goes,—that the act of the Commission was "an arbitrary and unreasonable act" in the sense that, if the members of the court had been sitting as members of the Commission, they would have thought the wiser or more reasonable thing to do would have been to modify the franchise in some such way as the court indicates, instead of cancelling it,—then that is simply an attempt to substitute the individual judgment of the members of the court for that of the members of the Public Service Commission on this question of administrative discretion, which was within the jurisdiction of the Commission, but wholly beyond judicial review by a constitutional court of the United States.

"It is true that the charter of the company when accepted by the corporators constituted a contract be-

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[4] Paragraph XVIII of the franchise (R. 13):

"In accordance with Section 3 of Public Resolution No. 23, approved May 1st, 1900, it is hereby provided that the franchises, privileges and concessions hereby granted, shall be subject to amendment, alteration or repeal."

tween them and the State, and that the amendment, when accepted, formed a part of the contract from that date and was of the same obligatory character." (The amendment to which reference is here made was an amendatory act of the Legislature of South Carolina, passed in December, 1855, amending the charter of the Northeastern Railroad Company so as to exempt its real estate from taxation during the continuance of the charter.) "And it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. But these considerations cannot be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the State by the law of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. *The original corporators, or subsequent stockholders, took their interests with the knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature.* The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contract with the corporators, which without that provision would be irrepealable and protected from any measures affecting its obligation."

Tomlinson v. *Jessup, supra,* 15 Wall. (82 U. S.) 454, 457-458 (FIELD, J.).

Further on in the same opinion MR. JUSTICE FIELD speaking for the Court said (at p. 459):

"Immunity from taxation, constituting in these cases a part of the contract of the government, is, by the reservation of power such as is contained in the law of 1841, *subject to be revoked* equally with any other provision of the charter *whenever the legislature may deem it expedient for the public interests that the revo-*

> *cation shall be made.* The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State." (*Italics supplied*)

V

There is an essential difference between outright "repeal" and "amendment".

A. Respondents say (Brief, p. 31, Heading) that there is "no sound distinction between a repeal and an amendment", and seek to apply to the *repeal* of this franchise the acknowledged rule with relation to *amendments* of franchises that the right to *alter or amend* "is not without limits", and that the alteration "must be reasonable", "must be made in good faith, and be consistent with the scope and objects of the act of incorporation", and that "Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration". *Shields* v. *Ohio, supra,* 95 U. S. 319, 324-325; *Berea College* vs. *Kentucky,* 211 U. S. 45, 57; *Fair Haven R. R. Co.* vs. *New Haven,* 203 U. S. 379, 388-389; *C. M. & St. P. R. Co.* vs. *Wisconsin,* 238 U. S. 491, 501-502; *Looker* vs. *Maynard,* 179 U. S. 46, 52; *Stearns* vs *Minnesota,* 179 U. S. 223, 259; *Sinking Fund Cases,* 99 U. S. 700, 720; *Stanislaus County* vs. *San Joaquin C. & I. Co.,* 192 U. S. 201, 213. And the Circuit Court of Appeals plainly lost sight of the difference between amendment and outright repeal, because the only cases it cites in support of the above quoted statement in its opinion (R. 92) that

> "the absolute cancellation of that part of the franchise pertaining to the use of the waters of the Lake would, in our opinion, be an arbitrary and unreasonable act, if it involved, as it may have, a taking of a valuable property right acquired by the appellants under the franchise",

are cases relating solely to *amendments* of franchises,[5] and not to "absolute cancellation" at all.

B. *But the essential distinction between "amendment or alteration" and outright "repeal" is clearly marked, and rests upon fundamental reasons.*

The basic characteristics of the two classes of acts are wholly different. "Repeal" or "revocation" or "cancellation" is the act of a single party, requiring no concurrence, and no further action by the other party. It simply puts an end to the contract or franchise, leaving nothing further to be done under it by the other party. But "amendment" or "alteration", on the other hand, is essentially bi-lateral in its nature, and it does require affirmative action by the other party in continuing to carry out the contract or franchise as thus altered or amended. And if it be an "alteration" or "amendment" of a franchise, pursuant to a reserved power to "alter or amend", by government action, without consulting the franchise holder, it amounts to forcing upon him, against his will, and expecting him to carry out, perhaps for many years to come, a new contract, different from that to which he had agreed in accepting the contract, and imposing on him different duties and obligations. That is a very different thing from simply ending it and releasing him. He may well insist that he cannot be required to accept such new contract, and to undertake such new duties and obligations, unless the amendments thus imposed upon him are reasonably "consistent with the scope and objects" of the original contract or franchise, and that "sheer oppression and wrong cannot be inflicted" upon him "under the guise of amendment or alteration". And so the cases above cited, with relation

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[5] *Shields* vs. *Ohio, Berea College* vs. *Kentucky, Fair Haven & Westville R. R. Co. vs. New Haven,* and *C. M. & St. P. R. Co.* vs. *State of Wisconsin, supra* (*ante,* p. 13); and *Com. of Inland Fisheries* vs. *Holyoke Water Power Co.,* 13 Gray 239.

to "alterations and amendments", hold. (*Ante*, p. 13). And those are the cases relied upon by respondents (brief, pp. 26-30), and by the Circuit Court of Appeals (R. 92, *supra*).

C. *But those cases have nothing whatever to do with an outright repeal of a franchise, such as that here involved, under a reserved power to "repeal".* That is a wholly different thing.

No case has been cited, and it is believed that none can be found, placing any such limitation, or any limitation whatever, upon the executive power of the government, in its sole discretion, to exercise a power of outright "repeal" expressly reserved in a charter or franchise. And this court has directly repelled and overruled the suggestion that any such limitation upon a reserved power to "repeal" may be implied. *Calder* v. *Michigan*, 218 U. S. 591, 598-599, quoted, ante, pp. 5-6. *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535, 540-542. *Greenwood* v. *Freight Co., supra*, 105 U. S. 13, 20-22. *Ramapo Water Co.* v. *New York, supra*, 236 U. S. 579, 583. And *confer* the dissenting opinion of JUSTICES DAY, MCKENNA, HUGHES and PITNEY, in *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 76-83, at pp. 78-80.

VI

The three questions put by the insular courts (District Court, R. 50; Supreme Court, R. 73) as the questions which they hold that the insular statute makes it their duty to answer upon an appeal from an order of the Public Service Commission, and which the Circuit Court of Appeals holds (Opinion, R. 85, 92) and respondents now contend (*Brief*, p. 26) the Circuit Court might properly consider upon appeal from the insular Supreme Court, are:

> "1. Whether the order appealed from, rendered by the Public Service Commission on March 8, 1929, is reasonable or not.
>
> "2. Whether said order is legal or not.

"3. Whether it has been based on incompetent evidence, affecting the decision and order of the Commission",

But those questions may be put at any time in relation to any act of the executive branch of the government, from the smallest to the greatest. And manifestly, as it seems to us, those questions belong in different categories. The two latter questions,—whether the order "is legal or not", and whether it was "based on incompetent evidence",—are judical questions, properly cognizable by the judicial power. (And *the question whether the order "is legal or not" comprehends the question of that kind of "reasonableness" or "unreasonableness" involved in determining whether or not it exceeds the limits of the executive power or deprives any person of life, liberty or property without due process of law; because, manifestly, if it offends in any such manner, it is not "legal".*)

But the remaining question,—the question numbered "1" as stated by the insular District Court as above quoted,—thus set off in contrast as a separate question over against the question whether the order is "legal" or not,—"Whether the order * * * is *reasonable* or not", plainly asks for something else, and is in another category. That question asks whether or not the act was a wise or considerate exercise of the executive discretion vested in the Commission; whether or not under the circumstances it was a "reasonable" way to solve the administrative problem which the Commission had before it. The insular courts apparently understood the insular statute as placing upon them the duty of thus reviewing the executive discretion of the Public Service Commission, and of determining whether or not its exercise of its executive discretion was "reasonable"; in the same way that an executive or administrative duty is placed upon the insular Supreme Court of reviewing the executive action of registrars of property by "administrative appeal" under Section 66 of

the insular Mortgage Law. Rev. Stats. and Codes of Puerto Rico, 1911, Par. 6750; and Act of March 1, 1902, Laws of 1902, p. 289, Rev. Stats. and Codes of 1911, Pars. 2180-2190. *Luce* v. *Registrar of Guayama,* 20 F. (2d) 115 (C. C. A.—I; June 16, 1927). That kind of administrative or executive power may, of course, be given to Congressional courts, such as the insular District and Supreme Courts (*Luce* v. *Registrar of Guyama, supra,* 20 F. (2d) at p. 116; *Keller* v. *Potomac Electric Power Co., supra,* 261 U. S. 428, 444; *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464, 468-469; *Radio Commission* v. *Nelson, supra,* 289 U. S. 266, 275). But nevertheless the decisions of such Congressional courts on administrative or executive questions of that kind may not be reviewed on appeal, or otherwise, by a constitutional court of the United States, such as the Circuit Court of Appeals. *Luce* v. *Registrar of Guayama, supra; Keller* v. *Potomac Electric Co., supra.* And hence, in this case, the Circuit Court of Appeals was without power to review that portion of the decision of the insular Supreme Court dealing with that question of the executive "reasonableness" of the Commission's order.

It is not a question of form of procedure, or whether or not the insular courts, reviewing the executive "reasonableness" of the Commission's order, had power, if they thought it unwise or executively "unreasonable", to substitute their own order in its place, or only to reverse it and send it back to the Commission with directions to try again; or in what form or method whatsoever the question may be raised. *It is,* on the contrary, *a matter of the essential character of the question itself;* whether it is in its essence judicial, and so cognizable by the federal "Judicial Power"; or is in its essence executive or administrative, to be determined by the executive power. If it be the latter, then, no matter in what form the question be raised, and no matter in what method of procedure, it may not be considered by the judicial power. "And this separation

and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism." *Springer v. Philippine Islands*, 277 U. S. 189, 201.

> "It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other." *Kilbourn* v. *Thompson*, 103 U. S. 168, 191.

As we have said, the essential difference between the several characters of the three questions put by the insular courts here, as above quoted (R. 50 and 73, *supra*), and all of which the Circuit Court of Appeals assumed it was its duty to examine,—and the clear cut distinction between the executive or administrative character of the first question, whether the Commission's order "is reasonable or not", as over against the true judicial character of the other two questions, whether the order "is legal or not" or is "based on incompetent evidence",—may be illustrated by applying them to any purely executive act, of the most ordinary, or of the gravest, character. Thus for example, with reference to an order of a Park Board to build a fence within the park or along its boundary, it may be asked whether the order is legal, that is, within the powers of the board, and whether it has been made in due form of law, or upon a proper hearing, as may be required by pertinent statutes or ordinances, and upon competent evidence if a hearing be required. Those are judicial questions, properly cognizable as such in any court clothed with jurisdiction to review the orders of the board. But, if the order to build the fence was legal, and was made in due form and upon proper hearing, then the further question whether it was "reasonable" or not, whether it would have been wiser

not to build the fence at all, or to build it in some other place, or to build the fence two feet higher or a foot lower, or with steel or concrete posts instead of wood posts, or to build a fence of wood pickets instead of a wire fence, are all questions of pure executive discretion, which,—(if the order is "legal", and made within the powers entrusted by law to the Park Board),—cannot be made the subject of review by the judicial power of the United States, in a constitutional court of the United States, in any form of procedure. And it is beyond the power of the Congress to invest the constitutional courts of the United States with jurisdiction to review such administrative questions. *Muskrat* v. *United States, supra,* 219 U. S. 346, 351-356. *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission,* 215 U. S. 216. *Gordon v. United States,* 117 U. S. 697, Appendix. *United States* v. *Ferreira,* 13 How. 40, 52. *Hayburn's Case,* 2 Dall. 409.

And so also in matters of the gravest import. For example, a similar set of three questions might be asked concerning Lee's order to Longstreet at Gettysburg for Pickett's charge. "Was it legal"; that is, was it within General Lee's powers as Commanding General? Was it in due form? And finally, was it "reasonable"? Manifestly, the first two questions are judicial in their nature and might, if properly arising in a case or controversy, be made the subject of judicial inquiry by the courts. But likewise plainly the last question, whether the order was "reasonable", is purely and simply an administrative or executive question, wholly beyond review by the judicial power in any form; and the fact that it might,—and did,—deprive many persons of property, of liberty, and of life, could not raise any judicial question of deprivation of life, liberty or property without due process of law, if the order was "legal", that is to say, within the powers legally vested in the Commanding General.

Such illustrations may go far afield; but the principle is always the same. If the act be within the scope of the

powers of the executive authority,—that is, if it be "legal", and if it be made in the manner and in the form prescribed by the pertinent laws, then it is not the subject of review by any other branch of the government, either by the legislature or by the courts; and whether "reasonable" or "unreasonable", whether wise or unwise, whether an act of the highest statesmanship, or the purest folly, it is beyond review by the judicial power. Historians may dispute to the end of time whether or not Lee's order to Longstreet was wise or "reasonable" or the reverse; but that kind of a question of "reasonableness" in an executive act or order can never be made the subject of review by the judicial power of the United States.

VII

The repeal of this franchise by the Public Service Commission of Puerto Rico, pursuant to the express power of "repeal" reserved in the franchise itself, was an exercise of pure executive power.

Respondents endeavor to avoid this proposition by contending that the Commission's order (R. 27-28) cancelling that portion of the original franchise held by Russell & Co.,

> —viz., that part of the original tripartite franchise to the Guanica Land Company for the railroad, the wharf, and the right to take water for irrigation from Lake Guanica, which had been transferred to Ensenada Estates, Inc., and by it in turn to Russell & Co.,—the part comprised in the first four paragraphs of the franchise (R. 8-10),—and which part of the franchise,—*and only that part, and nothing else,*—Russell & Co. claimed any interest in, by its answer before the Public Service Commission (R. 25),—

was not really a "repeal"; but was only in the nature of an "alteration or amendment" of the original franchise. Respondents say (Brief, p. 31, Heading):

"but we submit that cancellation of the water rights was in nature and effect an amendment of the entire integrated franchise within the meaning of the authorities quoted".

Respondents are trying, of course, to avail themselves of the rule stated in the cases cited in their brief, and in other cases to which reference is heretofore made (*ante,* pp. 13, 15) that, as contradistinguished from the unlimited character of the executive power of "repeal" under a reserved power in the franchise the power of "alteration or amendment" is "not without limits", and that such an "alteration or repeal" must be consonant with the scope and purpose of the original franchise intended to be still left in effect as thus modified,

VIII

But, on this record, it is perfectly plain that the cancellation of the franchise here involved was a true "repeal", and was not in the nature of "alteration or amendment".

The Circuit Court of Appeals treated it as an outright "repeal" or revocation of all of that part of the franchise in which Russell & Co. (or the individual respondents here, as its stockholders) had any interest whatever (R. 92); as did also the insular courts, both the District Court (R. 56, 60) and the insular Supreme Court (R. 65, 68). This was the only part of the franchise in which Russell & Co. (or these individual respondents as its stockholders) ever had or claimed any interest whatever. The original franchise of March 19, 1901, to the Guanica Land Company (R. 8-14) was for three separate things: *First,* To take not exceeding 20,0000,000 gallons of water a day from Guanica Lake (Pars. I-IV); *Second,* For a standard gauge private railway (Pars. V-VII), with respect to which, however, the Executive Council reserved the right (Par. XXII) to declare the company, its successors and assigns "a common carrier", and to extend the use of the railroad to the

general public; and, *Third,* For a dock or wharf in the Bay of Guanica, if the consent of the Secretary of War should be obtained, as a private wharf (Par. VIII-X), but with the like reserved right to the Executive Council in relation to the wharf as in relation to the railroad (Par. XXII, *supra*), to declare the "Company, its successors and assigns, a common carrier", and to extend the use of the wharf to the general public; and also with a provision (Par. XII), as to both the railway and the wharf, for their free use for certain government purposes.

The entire franchise was transferred by the original grantee to another corporation, "Guanica Centrale" and the assignment was approved by the Executive Council of Puerto Rico on October 31, 1901; but no subsequent assignment of the franchise or of any part of it was ever approved or authorized by the Executive Council, or by its successor created by the present Organic Act of Congress of March 2, 1917, the Public Service Commission of Puerto Rico (R. 16). But Russell & Co. now claim (*Answer of Russell & Co. to the Rule to Show Cause before the Public Service Commission,* Par. I; R. 25) that on March 15, 1917, the corporation Guanica Centrale granted to Ensenada Estates, Inc., a Connecticut corporation

> "all of that part of said franchise and of the rights therein contained, referring to the use of certain waters of Guanica Lake for purposes of irrigation, that is, to be more specific, the rights contained under Paragraphs I and IV, inclusive, of said franchise";

and that Russell & Co.

> "is at present the owner of all that part of said franchise having to do with the use of water for purposes of irrigation";

that "the said assignments or grants were communicated to the Executive Council of Puerto Rico and to the Public Service Commission",

"and although it is true that they were not approved by said Council and Commission, such approval was unnecessary for their validity inasmuch as the franchise itself authorizes its assignment or grant."

And it is that entire part of the franchise thus claimed to have been granted to the Connecticut Corporation, Ensenada Estates, Inc., and by it in turn to Russell & Co., which was cancelled by the Public Service Commission's order of March 8, 1929 (*R.* 27-28) *here involved.* That is, the order cancelled the whole of that part of the franchise in which Russell & Co. had or claimed any interest whatever.

It was, therefore, as to Russell & Co. and as to every part of the franchise in which Russell & Co. had any interest, a complete "repeal". It left nothing whatever for Russell & Co. to do under the contract. It imposed no new duties or obligations on Russell & Co.; or on any holder of that part of the franchise. It ended it. It left nothing further to be done. It wholly released Russell & Co., and any other holders or claimants in or to that part of the franchise, from any further obligations under it. *That is the distinctive character of a "repeal",* as contra-distinguished from an "alteration or amendment". The latter does purport to impose new or changed duties or obligations upon the franchise holder, and to require him to continue to discharge them; and does not wholly release him from obligations to the government under the franchise. (*Ante,* pp. 14-15). This was, therefore, a true "repeal".

IX

It is immaterial that it was a repeal of but one of the three parts of the original franchise grant, which were in their nature distinct and separable.

By the separate grant of that part of the franchise concerning the water rights to the Connecticut corporation, Ensenada Estates, Inc., in March, 1917, and by the assign-

ment by it, in the following June, to Russell & Co., of that "water rights" part of the original franchise as a separate thing, and by Russell & Co.'s acceptance of it, *the parties voluntarily separated the original franchise into wholly separate parts; in effect, into separate franchises.* What became of the other parts of the original franchise does not appear in this record. It does not appear that Russell & Co. has any interest whatever in them; or that the holders of those other parts of the original franchise (if they are still in existence) have any interest of any kind in this "water rights" part, or any contract of any kind with Russell & Co. With the validity of this separation, or attempted separation of the original franchise into separate parts by the voluntary action of the parties without the consent of the Executive Council, or of the Public Service Commission, of Puerto Rico, we need not here concern ourselves. If it was valid, then it effected a complete separation of the original franchise into separate parts,—in effect, as we have said, into separate franchises. And the entire franchise held or ever claimed by Russell & Co. was repealed outright by the order of the Public Service Commission on March 8, 1929. And if the parties' attempted separation of the franchise into several separate holdings was not valid, and was ineffective, then, of course, Russell & Co. took nothing by it, and in that event neither Russell & Co. nor either of these respondents as its stockholders is injured in any way by the Public Service Commission's repealing order.

Respondents speak of a *"group";* of the "water rights and railroad and dock", *"closely integrated into a single franchise which could only be held and enjoyed by a limited group"* (*Brief,* p. 31); and, in their "Statement of the Case", of the "water, railroad and dock provisions" of the franchise as being *"closely interlocked and inter-dependent, and all rights are confined to the group 'said company, its successors and assigns'"* (*Brief,* p. 8); and

that (p. 10) the franchise "*was obviously intended to be, and has, as a matter of fact, been,* the basis of a large investment by the franchise holders in lands, railroad, sugar mill and dock, *constituting an integrated enterprise of great value to the franchise holders,*—and to Puerto Rico" (*Italics supplied*); and further that (*Brief,* pp. 10-11) Russell & Co., after the assignment to it of the "water rights" portion of the franchise

> "was and continues to be a member of the group designated throughout the franchise as 'The Guanica Land Company, its successors and assigns'. Of this group, the South Porto Rico Sugar Company is an interested member 'apparently having acquired rights under the franchise to the railroad and wharf' ".

The last phrase, as to the South Porto Rico Sugar Company, is quoted from the opinion of the Court of Appeals (R. 83). And that idea of an "integrated group"; and, apparently, as a consequence, that the rights of other members of that "group", holding some interest in other parts of the franchise, were in some way affected by the cancellation of the part of the original franchise claimed by Russell & Co., runs all through the thought of respondents in their "Statement of the Case" and their argument here, and that, accordingly the Commission's order cancelling the water rights part of the original franchise held by Russell & Co. amounted in some way to an "alteration or amendment" of the whole of the original franchise, instead of being simply (*as it, in fact, was*) an outright "*repeal*" of that part which had been transferred to Russell & Co., and with which alone the Commission was dealing, and that, therefore, in some way, the Commission's powers of outright repeal of the part of the original franchise held by Russell & Co. should be treated as limited by some consideration of its effect on the other parts of the original franchise, the railroad and the wharf,—in which Russell & Co. never had, and never claimed, any interest whatever.

X

But there is not one word in this whole record to support any such idea of an integrated "group". Not one syllable or letter. Absolutely nothing of the kind. The assignments of that portion of the original tripartite franchise relating to the water rights to the Connecticut corporation, Ensenada Estates, Inc., in March, 1917, and by the latter corporation to Russell & Co. in June of that year, as set out in Russell & Company's answer before the Public Service Commission (R. 25), were clean-cut and complete assignments, with no strings of any kind. There is neither allegation nor evidence in the record of any connection whatever remaining between Russell & Co. and any holders of any other part (either the railroad or the wharf) of the original franchise. Nothing about any contracts between them; nothing about any reserved rights between them; nothing as to any inter-company or "group" relations of any sort. They stand on this record as complete strangers to each other. If Russell & Co. took anything at all, it took it as a new and separate franchise in itself, for all of that part of the original franchise relating to the water rights. That was in its nature a complete and separable thing. It was wholly cancelled by the Commission's order. It was a complete "repeal". It was not in any respect a mere "alteration or amendment" of the franchise. It had nothing to do with the holders of any other parts of the original franchise, either with the railroad or the wharf. And they have nothing to do with it.

XI

In determining whether or not a case presents a question of "unreasonableness" or "reasonableness" of executive action within the meaning of an attempted stretch of executive power beyond its proper limits, or of deprivation of property without due process of law in violation of constitutional rights, which may present a judicial question for determination by the courts, the dividing line is indicated in opinions of this court.

For example, in one of the cases cited by respondents (*Brief*, p. 22), *Porter* v. *Investors' Syndicate*, 286 U. S. 461, 468, it is said that the function of the State District Court under the State statute there involved "is not, strictly judicial", because it is not simply

> "to set aside a decision of the Commissioner if *arbitrary or unreasonable* AND HENCE *violative of constitutional rights*".

In other words, if the kind of alleged "unreasonableness" involved is not such a character as to be "violative of constitutional rights", then it falls into the other category of a question of executive "reasonableness" in the exercise of executive discretion.

And so this court said in *Radio Commission* v. *Nelson*, 289 U. S. 266, 278 (and from which respondents print a long excerpt as an appendix to their brief):

> "When on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision *upon the legal question whether the Commission has acted within the limits of its authority*, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the judicial power". (*Italics supplied*)

XII

This court has marked the distinction between "repeal" of a franchise on the one hand, and its "alteration or amendment" on the other hand.

Thus in one of the cases cited by respondents, it was held that the reserved power to "alter or amend" did not include the power to "repeal". *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 72; where the court said of the reservation of the power to "alter or amend":

> "It does not reserve any right to revoke or repeal the ordinance, or to affect the rights therein granted".

In other words, the two things belong in different categories, although habitually joined together in the ordinary statutory reservation of the right to "alter, amend or repeal"; and the distinction was particularly marked in the *Owensboro* case by the fact that this court expressly distinguished (at p. 73) from that case, the case of *Greenwood* v. *Freight Co., supra,* 105 U. S. 13, on the very ground that in the *Greenwood* case the reservation there involved

> "was a plain unmistakeable reservation of the right to repeal at the pleasure of the State".

XIII

Respondents reiterate (*Brief,* p. 39) that: "From the beginning and at every stage of this litigation Russell & Company has pressed the point that the cancellation order deprived it of property without due process of law".

But, inasmuch as this cancellation was made pursuant to the express consent of the franchise holder embodied in the reserved power in the franchise itself to repeal it at the pleasure of the government, the exercise of such reserved right of repeal could never be a deprivation of property without due process of law. As this court said in *Shields* v. *Ohio,* 95 U. S. 319, 324, *supra,* there can be no vested right to be invaded by such a repeal pursuant to consent embodied in the franchise itself. *"Consensus facit jus".* (See also, *ante,* pp. 4-6, 11-13).

A direct answer to respondents' contention is found in the language of Mr. Justice Day in his dissenting opinion on behalf of the four dissenting Justices Day, McKenna, Hughes and Pitney, in *Owensboro* v. *Cumberland Telephone Co., supra.,* 230 U. S. 58, 81-82, which, although occurring in a dissenting opinion, states the unquestioned rule:

> "It is also said that the exercise of the reserved right to repeal in cases like this will have the effect to destroy contract rights, upon the strength of which large investments may have been made. But this argu-

ment overlooks the proposition that, if the grant was made subject to the right to revoke by subsequent action of the authority which made the grant, then no contract was entered between the parties beyond the control of the reserved power of the municipality, for as Mr. Justice Miller said in the *Greenwood* v. *Freight Co. Case,* under such 'a provision * * * reserving to the legislature the right to amend or repeal it must be held to be part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation.' So, if this limitation in fact existed, the right to repeal was inherent in the authority which made the grant, and the grantee is conclusively presumed to be aware of this limitation, and to make his investments subject to the exercise of the reserved right. *Calder* v. *Michigan, supra.* Moreover, if limited grants are to be construed into perpetuities then the control over streets for railway, telephone and other kindred enterprises of enormous value are granted to private corporations without compensation for the use of such valuable rights which belong to the municipality. Recent cases in this court have shown the great value of such privileges, and that investors are found who are willing to pay for the privilege of using the public streets for these purposes."

And so also, it was said in *Tomlinson's* v. *Jessup, supra,* 15 Wall. (82 U. S.) 454, 457-458:

"The original corporators, or subsequent stockholders, took their interests with the knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature."

Counsel say (*Respondents' Brief,* p. 40) that the Guanica Land Company,

"would not have dreamed of accepting the franchise, unless it had believed and expected that the governmental authorities empowered to exercise the reserved

> power to amend or repeal the franchise would exercise it reasonably".

In other words, they relied upon the fairness and consideration of the executive authorities clothed with that executive power of amendment or repeal. They must still so rely; and this record shows no reason for questioning the fairness or wisdom of the Commission, or any reason why Russell & Co. should not continue to rely upon its executive discretion, as its predecessor, the Guanica Land Company, agreed to do in accepting the franchise. The Commission's order shows on its face (R. 27-28) an intention to deal fairly with the franchise holder. It contains an invitation, notwithstanding the reasons which seemed to the Commission to make the repeal necessary, for the franchise holder to submit to the Commission.

> "specific data with regard to the highest level of the waters of the lake, as well as the plans of any other works, in order that this level may be permanently kept,"

with a view, of course, to a new franchise.

XIV

Respondents' contention (*Brief*, p. 71) that Russell & Co. is not,—and that its predecessor, the Guanica Land Co., was not,—a "public service corporation", is wholly immaterial.

The contention was made in the Circuit Court of Appeals, and is answered in the opinion of that court (R. 86-89) overruling it. And, as the Circuit Court of Appeals there says (R. 87), if Russell & Co. was not to be considered as a "public service corporation" to the extent at least of being clothed with the powers it assumed to exercise in accepting the assignment of this franchise from its predecessor corporation in 1917, in the matter of holding back and taking the water from the sources in Guanica Lake, then it would necessarily follow that,

> "the errors assigned and the questions argued as to the jurisdiction and power of the Public Service Commission to revoke the concession, or any of the other questions sought to be raised, would be purely academic and unworthy of any consideration, for neither the Executive Council nor the Public Service Commission would have authority to grant such a concession, and Russell & Company would have acquired nothing by the grant, and there would be nothing to revoke."

XV

And likewise the contention made by Respondents in Point V (pp. 60, et seq.) of their Brief that

> "on a proper construction of the pertinent acts of Congress, the Public Service Commission has no power or jurisdiction to make the order appealed from",

because, as respondents contend (*Brief*, p. 61),

> "The power to amend, alter or repeal the Guanica franchise—as well as the power to modify and annul—was by the Organic Act of 1900 and the joint resolution and the franchise itself reserved solely to Congress and never vested in the Executive Council",

was overruled by the Circuit Court of Appeals, both in its opinion in the present case (R. 86, 88-90) and also in its opinion in the earlier injunction suit involving the validity of this same order of the Commission, *South Porto Sugar Co.* v. *Munoz*, 28 F. (2d) 820 (copy is Appendix II [pp. 45-50] to our original brief), where the Circuit Court of Appeals pointed out (28 F (2d) at p. 822; our original brief, p. 49) that appellants' (*respondent's*) contention there rested, as it does here (*Brief*, p. 61, *et seq.*) upon the supposed ground that the Congress, by the *proviso* at the end of section 32 of the former Organic Act for Puerto Rico, the Foraker Act of April 12, 1900, 31 Stat. 77, 83-84 (our original brief, p. 13), that all grants of franchises,

rights, privileges, or concessions of a public or quasi-public nature "shall be reported to Congress, *which hereby reserves the power to annul or modify the same*" (*Italics supplied*), amounted in effect to the Congress reserving

> "to itself alone jurisdiction to repeal or amend franchises previously granted by the Executive Council."

The Circuit Court of Appeals there said,—*and as it is submitted entirely correctly* (*South Porto Rico Sugar Co.* v. *Munoz, supra,* 28 F. (2d) 820, 822; our former brief, p. 50):

> "We cannot adopt this construction of the general reservation by Congress of the power to annul all franchises and laws of the experimental local government set up by Congress in Porto Rico. We are constrained to hold that the purpose of Congress was, experimentally and gradually, to vest in the Porto Rican government the general powers of state governments, subject to the reserved power to annul or modify franchises and laws if and when Congress sees fit. The reservation of the power to annul franchises granted by the Executive Council is in the same general terms as the reservation of the power to annul all laws. It did not in 1901 exclude the power granted by fair and necessary implication to the Executive Council to modify or repeal franchises granted by that Council. The like reservation contained in the Jones Act does not exclude or cut down the power of the Public Service Commission to repeal or alter franchises granted by it. Like the power to repeal statutes, the body that creates may alter or destroy the creation."

And as above pointed out, the Circuit Court of Appeals adhered to that decision, in the present case (R. 86).

XVI

These six individual respondents are not the *Sociedad en Comandita,* Russell & Co. That *Sociedad* is not here; and these six individuals had no authority to maintain the appeal from the Supreme

Court of Puerto Rico to the Circuit Court of Appeals in this case. (Our original brief, Point IV, pp. 29-30.)

As there pointed out, the appeal was taken from the insular Supreme Court from its judgment of November 9, 1933, nearly eight months after this court had decided in the case of *People of Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, on March 13, 1933, that this very *Sociedad en Comandita,* Russell & Co., was to be treated as a corporation; and not as a partnership.

Respondents deal at length with this question in Point IV (pp. 48-59) of their brief; but, it is submitted, wholly fail to establish any rights in these six individuals to maintain this appeal, in the absence of the *Sociedad,* Russell & Co., which alone claims, or ever has claimed, any interest in the subject matter of this litigation.

The answer filed with the Public Service Commission, to the Rule to Show Cause (R. 24-27), is by the *Sociedad* itself, Russell & Co., Sucrs. S. en C. and claims title to the franchise (Par. I; R. 25) in the *Sociedad,* "the partnership appearing herein". It is true that the appeal to the insular District Court was taken (R. 1) in the name of the six individuals, "members of the civil agricultural partnership of Puerto Rico, Russell & Co., Sucrs. en C.", on April 8, 1929 (R. 8); and that the appeal to the Supreme Court of Puerto Rico on June 26, 1930, was taken (R. 63) by "the plaintiffs" in the District Court and was captioned in the insular Supreme Court in their names, although the Supreme Court said in its opinion (R. 65): "Russell & Co. appealed from that judgment to this court".

B*ut both of those appeals,* that from the Public Service Commission to the insular District Court on April 8, 1929, and that from the District Court to the insular Supreme Court on June 26, 1930, *were taken after the Circuit Court of Appeals had held* in *People of Porto Rico* v. *Fortuna Estates,* 279 Fed. 500, 504-505, on March 8, 1922, followed by it in *Puerto Rico* v. *Russell &*

Co. (*Havemeyer*), 60 F. (2d) 10, 12-13, June 27, 1932, that the *Sociedad en Comandita* was to be treated as a partnership rather than a corporation,—(overruling in so doing the earlier decision of the Supreme Court of Puerto Rico in *People* v. *Rivera Zayas,* 29 Puerto Rico Rep. 423, 430, of May 27, 1921, and what had theretofore apparently been the established rule in Puerto Rico as to the juridical personality of such a *Sociedad*). Those decisions of the Circuit Court of Appeals stood unreversed at the times both of those appeals were taken in this case, on April 8, 1929 (R. 8), and on June 26, 1930 (R. 63); and, of course, were to be respected. And in apparent accordance with those decisions of the Circuit Court of Appeals, these six individuals, alleging themselves to be all the partners of the *Sociedad,* "a civil agricultural partnership," came into court on behalf of the partnership, both in the appeal from the Public Service Commission to the insular District Court on April 8, 1929 (R. 1, 2, 8, *supra*), and on the appeal from that court to the insular Supreme Court on June 26, 1930 (R. 63, 64, *supra*).

But before the appeal was taken from the insular Supreme Court to the Circuit Court of Appeals from that Supreme Court's judgment of November 9, 1933 (*Appeal perfected December* 28, 1933; R. 75) the picture had entirely changed. Eight months prior to that time, on March 13, 1933, this court, in its decision in *Puerto Rico* v. *Russell & Co., supra,* 288 U. S. 476, 478-482, had reversed the decision of the Circuit Court of Appeals in the same case (*Puerto Rico* v. *Russell & Co., supra,* 60 F. [2d] 10), and had expressly overruled the doctrine, theretofore held by that court, that the *Sociedad en Comandita* was to be treated as a mere partnership, and had held,—and in relation to this very *Sociedad en Comandita,* Russell & Co.,—that it was in effect a corporation, and was to be treated as such; and had expressly cited,—and, in effect, reinstated (at p. 481),—the earlier doctrine of the Supreme Court of Puerto Rico enunciated in *People* v. *Rivera Zayas, supra,* 29 Puerto Rico Rep. 423 430, that:

"Its members are not thought to have a sufficient personal interest in a suit brought against the entity to entitle them to intervene as parties defendant."

That was the law when these individual respondents,—and not the *Sociedad* itself,— assumed to appeal to the Circuit Court of Appeals from the judgment of the Supreme Court of Puerto Rico of November 9, 1933, in this case.

And the decision of this court was not merely, as respondents appear to assume (*Brief*, pp. 55, 58) that the *Sociedad* was to be treated as a corporation for the purposes of federal jurisdiction; but it was, on the contrary, that the *Sociedad en Comandita* actually *is in substance and effect a corporation, with all the essential characters of a corporation,* and is not essentially a partnership; and that it is for that reason,—because it really is a corporation,— that it is to be treated like other corporations for the purposes of federal jurisdiction, as well as for other purposes. This court there said (*Puerto Rico* v. *Russell & Co., supra,* at pp. 480-482):

"Therefore to call the *sociedad en commandita* a limited partnership in the common law sense, as the respondents and others have done, is to invoke a false analogy. In the law of its creation the *sociedad* is consistently regarded as a juridical person. It may contract, own property and transact business, sue and be sued in its own name and right. Civil Code (1930) Secs. 27 to 30; Code of Commerce (1930) Secs. 95, 97, 123, 124. Its members are not thought to have sufficient personal interest in a suit brought against the entity to entitle them to intervene as parties defendant. See *People* v. *Rivera Zayas,* 29 P. R. 423, 430. It is created by articles of association filed as public records. Code of Commerce, Secs. 95, 98; compare Civil Code, Secs. 1558, 1560. Where the articles so provide, the *sociedad* endures for a period prescribed by them regardless of the death or withdrawal of individual members. Civil Code, Secs. 1591, 1596, 1598; Code of Commerce, Sec. 141. Powers of management may be

vested in managers designated by the articles from among the members whose participation is unlimited, and they alone may perform acts legally binding on the *sociedad*. Civil Code, Secs. 1583, 1589; Code of Commerce, Secs. 102, 106, 125. Its members are not primarily liable for its acts and debts (Code of Commerce, Sec. 156), and its creditors are preferred with respect to its assets and property over the creditors of individual members, although the latter may reach the interests of the individual members in the common capital. Civil Code, Sec. 1590; see *Quintana Bros. & Co.* v. *S. Ramirez & Co.*, 22 P. R. 707, 716. Although the members whose participation is unlimited are made contingently liable for the debts of the *sociedad* in the event that its assets are insufficient to satisfy them (Code of Commerce, Secs. 125, 156; see *Successors of M. Lamadrid & Co.* v. *Torrens, Martorell & Co.*, 28 P. R. 824), this liability is of no more consequence for present purposes than that imposed on corporate stockholders by the statutes of some states. Compare *Louisville, C. & C. R. Co.* v. *Letson, supra,* 557, 558; *Liverpool Insurance Co.* v. *Massachusetts,* 10 Wall. 566, 575. These characteristics under the Codes of Puerto Rico give content to their declaration that the *sociedad* is a juridical person. That personality is so complete in contemplation of the law of Puerto Rico that we see no adequate reason for holding that the *sociedad* has a different status for purposes of federal jurisdiction than a corporation organized under that law."

That reinstated the ancient rule of the civil law and the earlier doctrine of the Supreme Court of Puerto Rico, including particularly the decision of that court in *People* v. *Rivera Zayas, supra,* 29 P. R. Rep. 423, 430, expressly cited by this court (at p. 481) that the members of the *Sociedad*

> "are not thought to have a sufficient personal interest in a suit brought against the entity to enable them to intervene as parties defendant."

And in the face of that express decision of this court, these individual defendants attempt to maintain this ap-

peal, taken eight months afterwards. The Circuit Court of Appeals disposed of this objection, and sustained its jurisdiction over this appeal, by saying (R. 81):

> "The order to show cause" (by the Public Service Commission; R. 15) "was issued to 'Russell & Co., Sucrs. en C., a limited partnership'. That company is here."

But the court was mistaken. That company is not "here". Here are only six individuals claiming to be all of its members or stockholders. But they have no power to represent the corporation in this suit. A judgment for or against them cannot bind it. Russell & Co. well knew how to appear in the insular courts and to take an appeal in its proper corporate personality, had it desired so to do. The precedents and cases collected in the Appendix to this brief (*infra,* pp. 39-41) amply demonstrate that. Some of them are cases where this very *Sociedad,* Russell & Co., had itself appeared in its proper corporate personality.

CONCLUSION

As in our original brief, it is submitted that, because of the absence of the necessary party, Russell & Co., Sucrs. S. en C., the judgment of the Circuit Court of Appeals should be reversed and the case remanded to that court with directions to dismiss the appeal from the Supreme Court of Puerto Rico for want of jurisdiction, or else that the judgment of the Supreme Court of Puerto Rico should be affirmed.

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APPENDIX

Juridical Personality of "*Sociedad en Comandita,* appearance in the insular courts in its own name as a juridical person.

Russell & Co., has at least three times before been in the Supreme Court of Puerto Rico. See

Russell & Co. v. *Benedicto,* 26 P. R. R. (Spanish text, p. 517; English text, p. 456).
Carreno v. *Russell & Co.,* 32 P. R. R. (Spanish text, p. 257; English text, p. 248).
Almodovar v. *Russell & Co.,* 34 P. R. R. (Spanish text, p. 94; English text, p. 90).

In each of these cases it appeared in its own name as a juridical entity.

A.—It is a long established rule in Puerto Rico that such a "*Sociedad en Comandita*" is a *juridical person,* with the capacity to make contracts and to sue and be sued in its own name.

Art. 116, Code of Commerce (Par. 7675, Comp. Laws of Porto Rico, 1911). (*Particularly clause 2, Spanish text*).
People v. *Zayas,* Dist. Judge, 29 Porto Rico Rep., 423, 428-431, 432 (WOLF, J.; involving this very concern, Russell & Co., S. en C.).

And see, also,

Clause 2, Art. 122, Code of Commerce (Par. 7681, Comp. Laws, 1911).
Sub-Section 2 of Section 27, Civil Code of Porto Rico Sections 1569, 1571, 1572, 1594, 1600, 1602, Civil Code (Pars. 4675, 4677, 4678, 4700, 4706, and 4708, Comp. Laws).
Articles 146 to 150 Code of Commerce (Pars. 7704 to 7708, Comp. Laws).

Sections 51 and 73, Code of Civil Procedure (Pars. 5035, and 5057, Comp. Laws).

See also,

Successors to Sabrino Fernandez & Co., v. *Registrar*, 27 Porto Rico Rep. 425, 427.
P. Gandia & Co. v. *Registrar*, 31 Porto Rico Rep. 74.

Suits are habitually brought for and against such partnerships (*sociedades*) in the insular courts, in the firm name (the "*razon social*" prescribed by Art. 147 of the Code of Commerce; Par. 7706 Comp. Laws).

For examples, see the cases in a single volume (Vol. 31) taken at random of the published Reports of the Supreme Court of Puerto Rico, besides the case above cited, of

P. Gandia & Co. v. *Registrar*, 31 P. R. Rep. 74,

also the following, among others, *in that single volume, viz.;*

Cid. v. *C. Perez Alverez, Ltd.*, 31 P. R. Rep. 197.
N. Santini & Co. v. *Santini*, 31 P. R. Rep. 308.
Alcover & Co. v. *Magraner*, 31 P. R. Rep. 747.
Moral & Co. v. *Bull Insular Line, id.*, 903.
Pasapera v. *Mendez Brothers, id.*, 904.
F. Fresno & Co. v. *Smaine, id.*, 912.
R. Boak & Co. v. *Armstrong & Co., id.*, 915.
Quinones v. *Panzardi & Co., id.*, 917.

B.—The "*Sociedad en Comandita*" is so generally regarded in Puerto Rico as a juridical entity, as a matter of course, that any question as to the character of such an organization appears to have been seldom raised directly. However, the following cases in addition to those above cited indicate its recognized character as a juridical entity:

Estape v. *Rocafort*, Tomo, 2, D. P. R., p. 252.
American Colonial Bank v. *Registrar*, 4 P. R., p. 273.
Delgado v. *Lecaroz & Co.*, 4 P. R., 291.
Brenes v. *Hartman*, 8 P. R., 361 (in the Spanish ver-

sion the words "limited commercial partnership" in this case appear as "*sociedad en comandita*").
Finlay v. *Finlay Brothers et al*, 8 P. R. 371, at p. 388.
Santiago Umpierre & Co. v. *Wener*, 10 P. R. 505, 507 (this involved a "*sociedad mercantil*").
Del Pilar v. *Velez*, 19 P. R. 1061, 1064.
(Suit must be in name of *sociedad;* "it alone could recover"; individual partners may not sue).
Quintana v. *Ramirez*, 22 P. R. 707, 716.
Cintron v. *Colorado*, 22 P. R. 541, 544.
Gandia v. *Registrar*, 31 P. R. 74.

See also,

Enciclopedia Juridica Española, Vol. 24, pp. 712-713; Vol. 28, pp. 870-872.
Manresa on the Spanish Civil Code (Codigo Civil Español), Vol. 1, pp. 217, 218, 227.

Both of these latter authorities are frequently referred to by the Supreme Court of Puerto Rico as authoritative commentaries on Spanish law. The Puerto Rican Civil Code, the Code of Commerce, and the Mortgage Law, are all taken directly from the Spanish law.